IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27121-8-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
EPANLITO ROCHA,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, A.C.J.—Epanlito Rocha challenges his conviction for first degree premeditated murder. On appeal, he alleges numerous errors. We conclude that even if an error was committed, it was harmless, Mr. Rocha received a fair trial, and sufficient evidence supported the conviction for first degree premeditated murder.

FACTS

Epanlito Rocha was charged with first degree murder for the shooting death of Michael Reyes. On September 30, 2006, Mr. Reyes and his fiancé, Jennifer Fisher, spent the night out with friends in Moses Lake. Mr. Reyes was looking for Oscar "Littleman"[1] Rodriguez, who owed Mr. Reyes $40.

[1] We refer to Mr. Rodriguez as "Littleman" for clarity, intending no disrespect.

Once or twice, the group of friends stopped on Sunny Drive where Mr. Rocha lived. Lori "Lala" Rodriguez, Floyd McAnulty (Ms. Fisher's father), and Mr. Rocha lived next to each other, all on Sunny Drive. Mr. Reyes and Lala were former neighbors. Lala is also Littleman's sister.

Ms. Fisher visited with her father. Meanwhile, Mr. Reyes visited Lala and was directed to Mr. Rocha's house, where Littleman had been visiting. Mr. Reyes knocked on Mr. Rocha's door several times that night looking for Littleman.

Mr. Rocha had a police scanner and a video surveillance system showing traffic toward the front of the house. He had the reputation of being a drug dealer and an enforcer. On the day of the incident, he had been selling drugs to 12 to 15 different people. One of the neighbors noted a tense environment around Mr. Rocha's house.

Mr. Reyes was alone and unarmed when he went to Mr. Rocha's door. Mr. Reyes stayed for only a few minutes on each occasion. He did not appear angry or threatening during these encounters. On the second visit, someone left Mr. Rocha's house, angrily telling one of Mr. Reyes's friends to get off the property. Mr. Reyes remarked to Ms. Fisher that the people in the house "just kept asking me how they know I'm not a cop." Report of Proceedings (RP) (Mar. 31, 2008) at 1173.

Ms. Fisher went to a neighbor's house to call for a ride. Mr. Reyes went again to Mr. Rocha's home. Mr. Rocha's ex-wife Jean Rocha, stepson Dale Bryant, uncle Paul Cervantes, and Kerry Reitz were in Mr. Rocha's home. Mr. Cervantes, Mr. Rocha's uncle, testified that the mood in the house had been tense all day and that he thought there was going to be a police raid "[b]ecause of all the drugs and stuff." RP (Apr. 1, 2008) at 1406. This time, Mr. Rocha yelled for Mr. Reyes to go home. When Mr. Reyes persisted, Mr. Rocha told him to come to the back door. At that point, Mr. Rocha became angry, swearing at Mr. Reyes and telling him to leave, and Mr. Reyes left.

On the street, Mr. Reyes had a conversation with a neighbor, Danny Deines, and then leaned up against Mr. McAnulty's car. Within a few minutes, Mr. Rocha came down the hall of his trailer with a revolver in his hand, swearing and ranting. He waved the gun around and stated: "I'll fucking kill the little fucker, that punk. I'll shoot them little bastards." RP (Mar. 28, 2008) at 943. Mr. Rocha ran out of the house, gun in hand, and was angrily "ranting and raving." RP (Mar. 28, 2008) at 945. Outside, Mr. Rocha continued to threaten Mr. Reyes, saying: "I'll fucking shoot you, fucker." RP (Mar. 28, 2008) at 946.

Mr. Rocha rapidly approached Mr. Reyes, who was still leaning against the car. Mr. Rocha accused Mr. Reyes of "trying to cause trouble in my 'hood." RP (Apr. 1,

2008) at 1645. He also asked Mr. Reyes: "[D]o you want problems, I'm not going to mess around with this." RP at (Apr. 1, 2008) 1532-33. After seeing the gun, Mr. Reyes laughed and asked Mr. Rocha: "[W]hat, are you going to shoot me over this bullshit." RP (Apr. 1, 2008) at 1645. Mr. Reyes told Mr. Rocha to put the gun down and started to back away.

Mr. Rocha appeared "[b]allistic" and "in a rage," and then, still in stride, he shot Mr. Reyes. RP (Mar. 28, 2008) at 946. Just before Mr. Rocha shot him, Mr. Reyes had turned to his right to run away. The bullet entered the left side of Mr. Reyes's chest by his armpit. Mr. Reyes ran a short distance before collapsing against a car. Police responded within minutes and took Mr. Rocha into custody. Mr. Reyes could not be resuscitated.

Afterwards, Mr. Rocha delivered conflicting stories of the incident: that he had not shot anyone; that he had shot someone; that he only had a toy cap gun; and that he knew better than to have a firearm because he was a felon. When someone told Mr. Rocha that they had seen him shoot Mr. Reyes, he said that Mr. Reyes came over and threatened his family. Then, he again denied having a gun.

When police drove past Mr. Reyes's body, Mr. Rocha animatedly expressed that it was awful and that Mr. Reyes should not have died like a dog in the roadway. However,

once he was at the police department, Mr. Rocha claimed that he saw someone else shoot Mr. Reyes and that he was being framed.

During the interviews, police presented various scenarios for the shooting, from accident to self-defense. After providing several different versions of the events, Mr. Rocha admitted that he was the shooter but claimed it was an accident. Nonetheless, Mr. Rocha was insistent that there were two shots fired. Sometimes he claimed that the bullet ricocheted off the ground, or that he had aimed to the side of Mr. Reyes. The State subsequently charged Mr. Rocha with first degree premeditated murder.

Toxicology Report. Before trial, the State moved to exclude evidence that intoxicants and drugs were found in Mr. Reyes's bloodstream during the autopsy. The toxicology report revealed the presence of methamphetamine and cocaine, and that Mr. Reyes had a blood alcohol level of .15. The State argued that such evidence was irrelevant, and was "simply being offered to demonstrate that the victim's a bad person and to prejudice the jury against the victim." RP (Mar. 20, 2008) at 28-29. Defense counsel argued that methamphetamine makes users irrational and more aggressive, therefore, suggesting that Mr. Reyes was the first aggressor.

The trial court asked the defense how it would demonstrate methamphetamine's effects on a person's judgment. Defense counsel suggested that he would use toxicologist

Breann Adkins for this testimony. This proposed expert witness was not on either side's witness list. The court refused to allow the defense to add an expert witness at the last minute, but permitted the defense to call her in rebuttal. The trial court later explained that it was an issue of notice. While the trial court did not foreclose the possibility of calling the toxicologist in rebuttal, it also stated: "[B]ut I've got to have a showing." RP (Mar. 20, 2008) at 34. At trial, however, there was no evidence of methamphetamine use admitted.

Juror Incident. In his opening statement, defense counsel argued that police had not interviewed certain people and failed to collect certain evidence. In the middle of this statement, juror 10 became emotionally distraught. She interrupted counsel and told the judge she needed a break. After a 15 to 20 minute recess, the juror told the court that she believed her son was one of the people whom police had failed to interview. The juror had overheard her son discussing that he had been at a party where gunshots were fired and concluded that her son was involved in the instant case. She explained that it was too coincidental.

Initially, the juror denied having shared this information with other jurors. A few minutes later, she clarified that she had spoken to the bailiff in front of the other jurors while she was hyperventilating in the jury room. All but five of the jurors acknowledged

overhearing the discussion with the bailiff. However, the jurors all agreed to abide by the court's instruction that this was not evidence for their consideration and denied that they would be influenced by juror 10's statements. Juror 10 was excused from the jury.

Counsel for both parties discussed the necessity of a mistrial on the basis that the jury was compromised. Although defense counsel expressed a belief that the jury had been compromised, he did not immediately ask for a mistrial. Instead, defense counsel continued with his opening statement and reiterated his claim that police failed to interview five young men at a nearby party. It was not until the end of the morning session that defense counsel requested a mistrial. The court denied the motion, stating: "The statement made may be some benefit to the defense, but the only one that I could see would be prejudiced by it is the [S]tate." RP (Mar. 25, 2008) at 284.

Evidentiary Issues. Mr. Rocha's uncle, Paul Cervantes, gave a statement to the police that Mr. Rocha had been selling drugs out of his home on the day of the shooting. The court had made a preliminary ruling permitting this evidence. Prior to the introduction of the testimony, an offer of proof was made. The prosecutor suggested that Mr. Rocha was motivated to kill Mr. Reyes because he believed Mr. Reyes was a police informant who was investigating Mr. Rocha's drug-selling operation. The court agreed the testimony was admissible, stating: "[I]t's clear to me that drugs have a lot to do with

this." RP (Mar. 31, 2008) at 1387.

Mr. Rocha's Prior Conviction. Also at trial, Corporal Annalisa Dobson testified that while Mr. Rocha was being taken into custody, he told her he knew better than to have a firearm because he was a felon. Defense counsel objected in a lengthy sidebar, claiming that the prosecutor was repeatedly violating the motions in limine. The court asked counsel to make a record outside the presence of the jury. Later, the trial court told counsel that it was willing to strike the testimony. Defense counsel did not ask for that remedy, and the trial continued. The prosecutor pointed out that defense counsel had stipulated to the fact that Mr. Rocha did not have the right to own or possess a firearm and, therefore, assumed that the defense was stipulating to Mr. Rocha's felony criminal history.

Evidence that the Gun was Stolen. The State presented testimony that the gun Mr. Rocha used was stolen. Mr. Rocha objected on the basis that the testimony was irrelevant and prejudicial. The State later presented evidence that Mr. Rocha's uncle, Mr. Cervantes, acquired the gun in a drug trade—consistent with the State's theory that Mr. Rocha and his uncle were selling drugs.

The jury found Mr. Rocha guilty as charged. This appeal followed.

ANALYSIS

Jury Misconduct. First, Mr. Rocha contends that the trial court erred by denying his motion for a mistrial based on jury misconduct. He contends that he was denied a fair trial by an impartial jury.

An appellant seeking a new trial on the basis of jury misconduct must make a strong, affirmative showing of misconduct in order to overcome the longstanding policy favoring "'stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.'" *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (quoting *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994)). But a jury commits misconduct when it "consider[s] extrinsic evidence and if it does, that may be a basis for a new trial." *Id.* "'Novel or extrinsic evidence is defined as information that is *outside all the evidence* admitted at trial, either orally or by document.'" *Id.* at 552 (quoting *Balisok*, 123 Wn.2d at 118).

"Trial courts are accorded discretion in denying a motion for mistrial; such denials will be overturned only when there is a 'substantial likelihood' the prejudice affected the jury's verdict." *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). The trial court "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). We review a trial court's denial of a motion for

mistrial for an abuse of discretion. *Id*.

Here, during defense counsel's opening statement, juror 10 became visibly distraught and was having difficulty breathing. Defense counsel had been arguing that police had failed to interview all of the appropriate witnesses. Juror 10 interrupted counsel and told the judge she needed to speak to someone. Before she was questioned about her distress, she was sequestered with the other jurors for 15 to 20 minutes while the court recessed.

The juror was convinced that her son was either involved in the crime, was a witness to the crime, or had information concerning the crime, but that he was never interviewed and would not be able to be a witness at trial. Juror 10 had previously overheard telephone conversations in which her son discussed being at a party where things got out of hand, gunshots were fired, and he feared for his life. During opening statements, juror 10 thought that her son was involved in this same incident.

While juror 10 was in the jury room, and in the presence of the other jurors, she told the bailiff that she thought her son might have been involved in this case. The bailiff told the trial court that was the extent of what juror 10 said, and he told her to not say anything else until she could speak with the judge. Juror 10 was excused. However, all but five of the jurors overheard juror 10's conversation with the bailiff.

Mr. Rocha now argues that the trial court abused its discretion by denying his motion for a mistrial based on jury misconduct. He claims that there are reasonable grounds to believe that he was prejudiced by juror 10's statement. Specifically, he asserts that the "jurors could not help but believe there was relevant evidence that would not be presented," and "could not help but speculate on the nature of that evidence." Br. of Appellant at 29. Mr. Rocha's argument is unpersuasive.

In general, jurors are presumed to follow the court's instructions to disregard improper evidence. *Russell*, 125 Wn.2d at 84. Here, the court instructed the jurors in this regard when the trial began. The judge emphasized: "That's probably the most important instruction I'll give you." RP (Mar. 25, 2008) at 202. Again, the court reminded the jury of this instruction immediately after excusing juror 10. The court informed the jury that juror 10's conversation fell into the category of evidence not received in court and should not influence their decision in this case. And the trial court instructed them a third time before deliberations, also saying: "You will disregard any evidence that either was not admitted or that was stricken by the court." RP (Apr. 4, 2008) at 2149. The jury expressed no problem with abiding by this instruction.

At one point, the court explained, if anything, juror 10's statement was beneficial to the defense. The trial court remarked: "The statement made may be some benefit to

the defense, but the only one that I could see would be prejudiced by it is the [S]tate." RP (Mar. 25, 2008) at 284. Juror 10, in fact, agreed with the defense counsel's opening statement, saying she did not believe that they had all the witnesses they needed.

The conclusion that juror 10's outburst favored the defense is further demonstrated by the attorneys' behavior. The prosecutor supported a mistrial. Defense counsel, on the other hand, immediately capitalized on juror 10's concerns by emphasizing this argument in both opening and closing. When invited to support his motion with argument, counsel refused to "scratch that scab," and added no further comment to the record. RP (Mar. 26, 2008) at 523.

Finally, once the evidence was presented, juror 10's mistaken belief that her son was involved became evident. While she believed that the shooting took place at a party her son attended, the testimony revealed that the shooting took place out on the street. There was no evidence that her son had been in the vicinity of the event. Under these facts, the jury would not have concluded that juror 10's son had anything of relevance to offer.

In sum, juror 10's statement did not prejudice Mr. Rocha and there was no jury misconduct that could have affected the verdict. Accordingly, we do not find reasonable grounds to believe Mr. Rocha was denied a fair trial.

ER 404(b) Evidence of Selling Drugs. Second, Mr. Rocha contends that the trial court erred by admitting testimony that he was selling drugs from his home on the day of the murder. He argues that the evidence was irrelevant and unfairly prejudicial under ER 404(b) and its admission violated his right to a fair trial. The State responds that the evidence was properly admitted for the purpose of showing motive. We will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Under ER 404(b), evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith. But such evidence may be admissible for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). To admit evidence of other wrongs under ER 404(b), the trial court must: (1) find by a preponderance of the evidence that the prior bad act occurred, (2) identify the purpose for which the evidence is offered, (3) determine whether the evidence is relevant to prove an element of the crime charged or to rebut a defense, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Mr. Rocha makes several claims of error with regard to the trial court's decision to

admit the ER 404(b) evidence. Mr. Rocha contends that the evidence was irrelevant; the trial court failed to identify the purpose for admitting the evidence; the State failed to adequately prove that he was selling drugs; the trial court failed to balance, on the record, whether the probative value of the evidence outweighed the potential unfair prejudice; and the trial court erred by failing to provide a limiting instruction. Mr. Rocha's arguments fail to convince us that the trial court abused its discretion.

The State persuasively argues that Mr. Rocha's motive for the murder is relevant under ER 401 and admissible under ER 404(b). Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence. ER 401. "The trial court is generally the proper court to weigh the relevance of evidence, and this court reviews such a determination for abuse of discretion." *State v. Foxhoven*, 161 Wn.2d 168, 176, 163 P.3d 786 (2007).

The record shows that the State's purpose in offering the challenged evidence was to show motive. At the time of the murder, Mr. Rocha did not know Mr. Reyes. According to the State's theory, Mr. Rocha reacted with violence to Mr. Reyes's visits to his home because Mr. Rocha was engaged in illegal activity and was paranoid that he would be caught. Even Mr. Rocha acknowledges that the issue at trial was whether he acted in self-defense or murdered Mr. Reyes with premeditated intent. After the State

explained its theory at length and the evidence it planned to offer to support it, the trial court stated to the defense: "They're entitled to their theory as well as you are." RP

(Mar. 20, 2008) at 103. Here, the evidence of the drug sales from Mr. Rocha's home was relevant to the issue of Mr. Rocha's motive, and that purpose was clearly identified on the record.

Mr. Rocha also claims that the State failed to prove the drug sales by a preponderance of evidence. However, the record shows that Mr. Cervantes gave a statement to police in which he admitted that he and Mr. Rocha had been selling drugs from the home. As the State points out, this statement was entitled to credibility because in admitting the drug sales, Mr. Cervantes spoke against his own interest and that of his nephew, Mr. Rocha. He also gave the statement close in time to the murder, when his memory was fresh.

Next, Mr. Rocha's assertion that the trial court failed to balance whether the probative value of the evidence outweighed the risk of prejudice is not supported by the record. In ruling on the motion in limine, the trial court expressly cited ER 403 and the required balancing test. The trial court weighed the probative value of the evidence against its prejudicial effect and determined that the probative value was sufficient,

stating: "I don't see the prejudice as all that high, but I can see that the probative value as to why somebody got shot at least from the [S]tate's perspective, it's admissible." RP (Mar. 20, 2008) at 104-05.

Finally, Mr. Rocha argues that the trial court erred by failing to instruct the jury on the proper purpose of the ER 404(b) evidence. If evidence of other crimes, wrongs, or acts is admitted under ER 404(b), the trial court must give, "upon request," a limiting instruction to the jury. ER 105; *Foxhoven*, 161 Wn.2d at 175. But a trial court does not have a duty to give a limiting instruction sua sponte. *State v. Noyes*, 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966). Moreover, "[i]n the absence of either a violation of a constitutional right or a request to instruct there can be no error assigned on appeal for failure to give an instruction." *State v. Scott*, 93 Wn.2d 7, 14, 604 P.2d 943 (1980).

Here, the trial court engaged in the proper analysis before deciding to allow the evidence of drug sales from Mr. Rocha's home into evidence. We conclude that the evidence of the drug sales was proved by a preponderance of the evidence, was admitted for the proper purpose of showing that Mr. Rocha had a motive for the murder, that the trial court did not abuse its discretion by concluding the evidence was relevant, and that its probative value outweighed its prejudicial effect. Lastly, the trial court did not err by failing to provide a limiting instruction in the absence of a request by counsel to do so.

Based on this record, the trial court did not abuse its discretion by admitting this evidence.

Ineffective Assistance of Counsel. Third, Mr. Rocha contends he was denied his right to effective assistance of counsel because defense counsel failed to request a limiting instruction on the proper purpose of the ER 404(b) evidence. As noted above, when a court admits evidence of other wrongs under ER 404(b), it must give the jury a limiting instruction if requested by a party. *See Foxhoven*, 161 Wn.2d at 175; *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

Washington adopted the *Strickland* two-part test for evaluating claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, a defendant must show that defense counsel's performance was deficient and that prejudice resulted from the deficiency. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). "A failure to establish either element of the test defeats the ineffective assistance of counsel claim." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Reviewing courts engage in a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This presumption will be rebutted only by a clear showing of incompetence. *State v. Varga*,

151 Wn.2d 179, 199, 86 P.3d 139 (2004). Further, the defendant bears the burden of showing there were no conceivable legitimate strategic or tactical reasons explaining counsel's performance. *McFarland*, 127 Wn.2d at 336. If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, we will not find it ineffective. *Davis*, 152 Wn.2d at 673.

Mr. Rocha argues that because defense counsel failed to obtain a limiting instruction, the jury was free to consider this evidence for improper purposes and could have concluded that he had a propensity to commit crime. He further argues that there was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of the drug-dealing evidence. We disagree.

Where a party fails to request a limiting instruction, our courts have consistently held that such a failure can be presumed to be a legitimate tactical decision designed to avoid reemphasizing damaging evidence. *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27 (2005) (quoting *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000)).

In this case, we are persuaded that Mr. Rocha's counsel made a legitimate tactical decision not to request a limiting instruction. We can presume counsel decided not to request a limiting instruction on the ER 404(b) evidence of drug selling as a strategic attempt to avoid emphasizing the unfavorable testimony. Moreover, Mr. Rocha does not

show that his counsel's failure to propose a limiting instruction was anything but a tactical decision.

Evidence of Prior Felony—Possession of a Gun. Fourth, Mr. Rocha contends that the trial court erred by denying a motion for mistrial based on Corporal Dobson's testimony that Mr. Rocha confessed to being a felon. The State correctly points out that defense counsel did not make a motion for a mistrial predicated on the corporal's testimony.

On direct examination, Corporal Dobson testified about the statements Mr. Rocha made while being taken into custody. When the prosecutor asked if Mr. Rocha said anything to her about his right to carry a gun, she testified: "Yes, he did. He said he knew better than to have a firearm because he was a felon." RP (Mar. 25, 2008) at 296.

Defense counsel immediately objected. Then, when the trial court asked what his motion was, he stated: "For the prosecutor to stop violating the motions in limine." RP (Mar. 25, 2008) at 296. The prosecutor argued that the question was proper, given that the defense had already stipulated to the fact that Mr. Rocha did not have the right to own or possess a firearm. At that point, the trial court asked counsel to make a record outside of the presence of the jury.

With the jury dismissed, the court asked defense counsel if he wished to make a

record. Defense counsel indicated his dissatisfaction with Corporal Dobson's nonresponsive answer, but stated: "I don't think that's a big complaint." RP (Mar. 25, 2008) at 308. At that point, the trial court asked if counsel had anything else to discuss. Defense counsel told the court that the prosecutor wanted to address the earlier motion for a mistrial based on the incident concerning juror 10. The court had previously stated that it would consider additional authority on the matter. The trial court then asked defense counsel if he wished to maintain that motion, to which counsel replied: "You've heard my position." RP (Mar. 25, 2008) at 308.

Mr. Rocha claims that he made a motion for a mistrial on the basis of Corporal Dobson's testimony and that the trial court denied the motion. The State correctly asserts that this is a misinterpretation of the record. In fact, in referring to this same discussion in his statement of facts, Mr. Rocha's appellate counsel states that "defense counsel *renewed* its motion for a mistrial." Br. of Appellant at 19 (emphasis added). Having found, after a careful reading of the record, that no motion for a mistrial was made with regard to Corporal Dobson's testimony, there is no error.

Evidence of Receipt of Stolen Gun. Fifth, Mr. Rocha contends that the trial court committed reversible error by allowing the State to present evidence that the gun used in the shooting had been stolen. He argues that the evidence was unfairly prejudicial and

irrelevant.

Mr. Rocha claims that evidence that the gun was stolen allowed the jury to make the impermissible inference that Mr. Rocha either stole the gun or knew it was stolen. He then argues that the jury likely believed that he was a thief and, therefore, dishonest. Finally, he argues that if the jury concluded that he was dishonest, it is "probable" that it found that he was not credible and rejected his self-defense claim. Br. of Appellant at 42. Mr. Rocha's argument is unpersuasive.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the case more or less probable than it would be without the evidence. ER 401. Relevant evidence is admissible unless its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

As noted above, the State's theory was that Mr. Rocha and his uncle, Mr. Cervantes, were drug dealers, explaining the drug deal-related paranoia that ultimately resulted in Mr. Rocha's violent confrontation and murder of Mr. Reyes. Mr. Cervantes testified that he was involved in a drug deal in which he acquired two guns, one of which he gave to Mr. Rocha.

There is no evidence in the record supporting an inference that Mr. Rocha stole the gun or knew it to be stolen. The gun owner testified he did not know anyone by the name of Epanlito Rocha nor had he ever seen Mr. Rocha near his house. Mr. Cervantes was shown the murder weapon at trial, but he could not remember if that was the same gun he gave to Mr. Rocha. However, the jury may have believed the testimony that Mr. Cervantes possessed stolen guns but would not have believed Mr. Rocha was dishonest merely because his uncle traded in stolen property.

Finally, Mr. Rocha's credibility was undermined by the widely conflicting accounts he gave of the shooting. During his interviews with police, Mr. Rocha claimed he did not have a gun, could not possess a gun, only had a cap gun, was protecting his family, did not shoot anyone, disapproved of the killing, saw three masked men shoot Mr. Reyes, saw three men in blue bandanas shoot Mr. Reyes, saw Mr. Reyes's friends leave in a white or tan car, had a gun, shot Mr. Reyes by accident, shot him by ricochet, shot wide, shot only a cap gun, and shot him in self-defense.

The court did not abuse its discretion by admitting relevant evidence that cannot reasonably be said to have prejudiced Mr. Rocha.

Toxicology Evidence of Victim. Sixth, Mr. Rocha contends that the trial court abused its discretion by excluding evidence that Mr. Reyes had cocaine and

methamphetamine in his system at the time of his death. Relying on *State v. Teuber*, 109 Wn. App. 640, 36 P.3d 1089 (2001), Mr. Rocha argues that evidence of drug use can be relevant to explain a person's actions. Mr. Rocha claims that evidence showing that Mr. Reyes was under the influence of drugs at the time of his death would have explained his aggressive and bizarre behavior, corroborated Mr. Rocha's testimony, and made his claim of self-defense more probable. He argues that because the evidence was relevant to the central contention of the defense, and because no compelling State interest justified its exclusion, the court's ruling violated his constitutional right to present a defense.

A criminal defendant has no constitutional right to have irrelevant or inadmissible evidence admitted in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Before trial, the State moved to exclude evidence that drugs were present in Mr. Reyes's blood, arguing that it was prejudicial. The State further argued that the evidence would not be relevant without an expert to testify about the toxicology report or how the reported substances affected Mr. Reyes's perceptions.

The State also argued that the mere presence of some intoxicants or drugs in the victim's bloodstream is not enough to establish relevance, stating: "[S]imply the fact that he had methamphetamine in his system does not make it more or less likely that he was the first aggressor in this case." RP (Mar. 20, 2008) at 30.

During the hearing, and for the first time, Mr. Rocha proposed to use the State's toxicologist as an expert witness. But the toxicologist was not on either party's witness list, and the court refused to allow Mr. Rocha to add her at the last minute.

CrR 4.7 defines the discovery obligations of both the prosecution and defense. CrR 4.7(b)(1) requires a defendant to disclose to the prosecuting attorney "no later than the omnibus hearing" the names and addresses of witnesses the defendant intends to call at trial. "The disclosure duty is a continuing obligation, and any new material or information must be promptly disclosed." *State v. Linden*, 89 Wn. App. 184, 190, 947 P.2d 1284 (1997) (citing CrR 4.7(h)(2)). If at any time during the course of proceedings it is brought to the court's attention that a party has failed to comply with an applicable discovery rule, the court may "enter such other order as it deems just under the circumstances." CrR 4.7(h)(7)(i).

The decision to admit or exclude evidence lies within the sound discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion. Likewise, a trial court has wide discretion in ruling on discovery violations. *Linden*, 89 Wn. App. at 190. An abuse of discretion occurs when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or untenable reasons. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001) (quoting *State v.*

Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

Even if the trial court abused its discretion by excluding evidence, the error will not require reversal if it is harmless beyond a reasonable doubt. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). An error is harmless beyond a reasonable doubt where there is no reasonable possibility that the outcome of the trial would have been different had the error not occurred. *Powell*, 126 Wn.2d at 267. "A reasonable probability exists when confidence in the outcome of the trial is undermined." *Id.*

Assuming, without deciding, that the trial court erred by excluding evidence of the toxicology report, any error was harmless. As the State points out, there were eyewitnesses to the shooting and Mr. Rocha himself confessed. Mr. Rocha's self-defense claim was riddled with inconsistencies, which served to undermine his credibility.

With the exception of Mr. Rocha's testimony, the evidence presented at trial shows that Mr. Reyes was not belligerent or acting aggressively that evening. The testimony was also consistent that Mr. Reyes was not angry or threatening when he approached Mr. Rocha's house. When Mr. Rocha's own guest, Kerry Reitz, was directly asked about how Mr. Reyes was acting during the visit immediately preceding his death, she testified that Mr. Reyes was "very nice" and "polite." RP (Mar. 28, 2008) at 929. She went on to testify: "[H]e wasn't belligerent, he wasn't off at all, he didn't raise his

voice, he didn't cuss." RP (Mar. 28, 2008) at 929. She also testified he did not have a weapon and when he was asked to leave, he left.

Ms. Reitz further testified that Mr. Rocha picked up the gun after Mr. Reyes had already left, and was yelling that he was going to shoot Mr. Reyes. At that point, Mr. Rocha charged out of the house to confront Mr. Reyes, making Mr. Rocha the first aggressor. Mr. Reyes had begun backing away and his body was turned in flight as the bullet struck him. Although Mr. Rocha testified at trial that he fired two shots only after he heard two gunshots, multiple witnesses denied that Mr. Reyes had any weapon.

Moreover, Mr. Rocha sought to have Breann Adkins, the toxicologist listed on the report, testify at trial. However, earlier in the hearing, defense counsel indicated that Dr. Logan and Fiona Cooper were the individuals who authored a paper for the National Highway Traffic Safety Administration detailing the effects of drugs on a person's behavior. As the State correctly points out, there was no evidence that Ms. Adkins would have stated, based on a medical certainty, whether a condition caused a particular reaction, or whether the reaction occurred at all. Moreover, there was no evidence of the quantity or duration of Mr. Reyes's drug use, factors which may have had a bearing on the drug's effect on Mr. Reyes that day. *See State v. Thomas*, 123 Wn. App. 771, 98 P.3d 1258 (2004).

Given the substantial evidence supporting the jury's verdict and contradicting Mr. Rocha's inconsistent self-defense claim, this court is persuaded the result would not have been different had the evidence of Mr. Reyes's drug use been admitted. Accordingly, the trial court's decision to exclude the evidence, even if error, was harmless beyond a reasonable doubt.

Cumulative Error. Finally, Mr. Rocha argues that cumulative error denied him a fair trial. We disagree. The application of the cumulative error doctrine is limited to instances where there have been several trial errors that standing alone may be insufficient to justify reversal, but when combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where the defendant fails to show prejudicial error, he also fails to show that cumulative error deprived him of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

We affirm the conviction for first degree premeditated murder.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, A.C.J.

WE CONCUR:

Sweeney, J.

Brown, J.